

The Texas Commission on Environmental Quality (commission) adopts new §295.17. Section 295.17 is adopted *without changes* to the proposed text as published in the April 28, 2006, issue of the *Texas Register* (31 TexReg 3502) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

The Rio Grande below Fort Quitman is regulated by the Rio Grande Watermaster under Texas Water Code, §11.326 and §11.327. 30 TAC Chapter 303, Operation of the Rio Grande, contains the Rio Grande Watermaster's rules. These rules recognize that the water rights in this area were adjudicated by a court, *State v. Hidalgo County Water Control & Improv. Dist. No. 18*, 443 S.W.2d 728 (Tex. App. - Corpus Christi 1969), *writ ref'd n.r.e.*, and that below Amistad Reservoir, water rights are not based on the priority system (first in time is first in right) as in the rest of the state.

Senate Bill (SB) 1902, and House Bill (HB) 2250, 78th Legislature, 2003, amended Texas Water Code (TWC), §11.3271, Powers and Duties of Rio Grande Watermaster, by amending Subsection (e), and adding Subsections (f) - (k). The provisions of the two bills are identical except for Subsection (j), relating to central repositories for documents.

Subsection (e) of the bills was amended to provide that the Rio Grande Watermaster's duties shall include activities relating to situations of imminent threat to public health and safety or the environment and required that the commission adopt rules which define situations of imminent threat and address the watermaster's duties in response to terrorism.

Subsections (f) - (i) provide that the commission may issue a permit which allows a person to place groundwater in the river and store it in a reservoir for release at a later time. The commission is to write rules which will account for any discharge, delivery, conveyance, storage, diversion, or associated loss of water conveyed down the Rio Grande. The rules must also protect other water right holders which store water in the reservoir and be consistent with the 1944 Treaty between the United States and Mexico. The commission may not issue this permit if it determines that the water to be conveyed will degrade the water quality of the Rio Grande. These permits will be called water-in-transit permits.

Subsection (j) of the two bills requires the watermaster to maintain a place available to the public that will contain copies of documents which the commission requires to be filed in connection with water rights in the lower, middle, or upper basin of the Rio Grande. SB 1902 provides that the watermaster is the “official recorder” of “all instruments, including deeds, deeds of trust, financing statements, security agreements, and liens” filed in connection with water rights. HB 2250 provides that the watermaster shall “maintain a central repository” that includes “certified copies of all instruments, including deeds, deeds of trust, and liens” filed in connection with water rights.

SB 1902 also provides that an instrument should be filed “in the same manner as required by other law for the same type of instrument,” and that “the filing of an instrument under this subsection results in the same legal and administrative status and consequences as a filing under other law for the same type of instrument.” Further, an instrument filed under this law “shall be construed by a court, financial institution, or other affected person in the same manner as an instrument of the same type that is filed

under other law.” HB 2250 does not include any of this quoted language, but instead provides that “a lien against a water right shall not be effective against third parties unless a certified copy of the instrument is filed with the watermaster,” but that the law “does not affect the validity of a lien as between the holder of the water right and the holder of the lien or the requirements or validity of any other law governing the perfection and recordation of these instruments.”

Both bills allow a fee to be collected for filing these instruments. SB 1902 further states that the commission shall adopt rules which “prescribe the procedures necessary for the proper implementation of this subsection, including reasonable transition provisions, if appropriate.”

To implement this legislation, the commission concurrently amends this chapter; 30 TAC Chapter 297, Water Rights, Substantive; and 30 TAC Chapter 303; Operation of the Rio Grande.

The adopted rule implements the provisions of the two bills. Concerning rules for terror threats, the adopted commission rules require the Watermaster to communicate with the agency Homeland Security Coordinator if activities are noted which may be suspicious. Concerning the bed and banks provisions of these two bills, the commission adopts procedures that will protect existing surface water right holders in the Rio Grande and will allow the commission and State of Texas to comply with the Rio Grande Treaty between the United States and Mexico.

Concerning the provisions of the bills relating to filing documents with the Rio Grande Watermaster, the two bills are in conflict relating to the effect of filing and failure to file. The commission has

determined that it should not adopt rules relating to the legal effect of filing or failing to file documents with the Rio Grande Watermaster because the commission does not regulate these matters. Therefore, the commission leaves the questions of the ramifications and effect of filing or failing to file documents with the commission to interpretation of the statutes by the courts. These rules would provide procedures for filing documents with the Rio Grande Watermaster.

SECTION DISCUSSION

Adopted new §295.17 provides that this chapter does not apply to water-in-transit permits. These permits are governed by Chapter 303.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a “major environmental rule” as defined in the act. The intent is to indicate that Chapter 295 does not apply to water-in-transit permits and to refer the reader to Chapter 303 for the requirements for those permits. The purpose of the rule is not to protect the environment or reduce risks to human health due to environmental exposure.

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a “major environmental rule” as defined in the act. The intent of the rulemaking concerning terror threats is not to reduce risks to human health from

environmental exposure, but to provide new duties for the Rio Grande Watermaster relating to actions during terror threats. The rules relating to terror threats could be considered to protect the environment. However, these rules do not exceed a standard set by federal law, exceed an express requirement of state law, or exceed a requirement of a delegation agreement or contract between the state and an agency of the federal government, and these rules are not adopted under the general powers of the agency instead of a specific state law. The rules relating to bed and banks permits are not for the purpose of protecting the environment or protection from environmental exposure, but are to allow the conveyance and storage of groundwater in the river and to protect existing water rights. The recordkeeping rules are not for the purpose of protecting the environment or reducing risks from environmental exposure but are to provide a local public place for documents to be filed.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these adopted rules in Chapter 295 and performed a preliminary assessment of whether Texas Government Code, Chapter 2007 is applicable. These rules are simply a procedural statement which refers the reader to another chapter for water-in-transit permit requirements. The rules do not affect private real property. Thus, these new rules do not constitute a taking under the Texas Government Code.

The commission evaluated the adopted rules and performed a preliminary assessment of whether Texas Government Code, Chapter 2007 is applicable. Concerning actions to be taken by the Rio Grande Watermaster due to terror threats, the rules are written in response to a real and substantial threat to

public health and safety, are designed to significantly advance the health and safety purpose, and do not impose a greater burden than is necessary to achieve the health and safety purpose.

For the bed and banks permits and the recordkeeping requirements of the rules, none of the exceptions in §2007.003(b) apply to this rulemaking. The specific purpose of these adopted rules is to allow the commission to issue bed and banks permits for conveyance of groundwater to be stored in a reservoir, and to provide new duties for the Rio Grande Watermaster relating to bed and banks permits for conveyance of groundwater to be stored in a reservoir, recordkeeping, and monitoring water right activities in the Rio Grande basin. The adopted rules would substantially advance this stated purpose by providing procedures for each of these duties.

There are no burdens imposed on private real property due to these rules requiring the Rio Grande Watermaster to issue bed and banks permits and keep records. The rules on recordkeeping do not impact real property. The new rules relating to these bed and banks permits in the Rio Grande are specifically written to prevent any impact on their property because under the “Rule of Capture” persons may pump water from their land if they are not wasting the water or causing subsidence or other damage to other land. These rules do not affect that law. Additionally, a permittee will not be allowed to remove all of the water put into the river under the permit. This limit on how much water can be taken from the river is necessary to protect water right holders and to comply with the 1944 Treaty, both of which are required in Texas Water Code, §11.3271. Thus, these new rules do not constitute a taking under the Texas Government Code.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rules and found that they are neither identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). The purpose of the rulemaking is to provide notice that this chapter does not apply to applications for water-in-transit in the Rio Grande and to provide a cross-reference to rules that are applicable to water-in-transit in the Rio Grande. Therefore, the adopted rule is not subject to the Texas Coastal Management Program.

PUBLIC COMMENT

No public hearing was held on this rulemaking. The Rio Grande Watermaster Advisory Committee, the Rio Grande Regional Water Authority (RGRWA), and the Rio Grande Water Planning Group (RGRWPG) submitted comments generally supporting the rulemaking.

RESPONSE TO COMMENTS

The Rio Grande Watermaster Advisory Committee, the RGRWA, and the RGRWPG commented that the proposed rule does not negatively impact the existing water allocation system or water rights. Based on the general support received from public comments, no changes were made to the rule.

SUBCHAPTER A: REQUIREMENTS OF WATER RIGHTS APPLICATIONS

GENERAL PROVISIONS

DIVISION 1: GENERAL REQUIREMENTS

§295.17

STATUTORY AUTHORITY

The new section is adopted under amendments to Texas Water Code, TWC, §11.3271, which provides that the Rio Grande Watermaster's duties include activities related to situations of imminent threat to public health and the environment, storing water in a reservoir for release at a later time, water-in-transit that is being conveyed down the bed and banks of the Rio Grande under a permit and rules issued by the commission, and maintaining a central repository for the public that includes certified copies of instruments that the commission requires to be filed in connection with water rights in the lower, middle, or upper basin of the Rio Grande and that are subject to a water right. The adopted new section is also authorized by TWC, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §5.013(1), which provides that the commission has general jurisdiction over water and water rights including the issuance of water rights permits, water rights adjudication, cancellation of water rights, and enforcement of water rights.

This adopted new section implements TWC, §11.3271, and TWC, §5.103.

§295.17. Water-in-Transit in the Rio Grande.

This chapter only applies to applications for water-in-transit in the Rio Grande to the extent that the rules for water-in-transit applications in the Rio Grande in Chapter 303 of this title (relating to Operation of the Rio Grande) do not govern or do not expressly conflict with this chapter. The applicable rules for water-in-transit in the Rio Grande are in Chapter 303 of this title.